No. 3704

United States
Circuit Court of Appeals
For the Ninth Circuit

McDONALD-WEIST LOGGING COMPANY, a Corporation,

Appellant,

vs.

E. L. COBB, as Trustee in Bankruptcy of the CRAIG LUMBER COMPANY, a Corporation, Bankrupt,

Appellee.

Brief of Appellant

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

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BRIEF OF APPELLANT

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court for the District of Alaska, Division Number One, at Juneau, upholding the decision of a Referee in Bankruptcy allowing the claim of appellant, MacDonald-Weist Logging Company, a corporation, as a general claim against the bankrupt estate of the Craig Lumber Company, a corporation, bankrupt, and denying the same as a preferred claim by virtue of a lien notice duly filed by appellant.

The Craig Lumber Company, a corporation, (hereinafter called the Lumber Company) was organized and existing under and by virtue of the laws of the State of Washington and was, during the year 1918, engaged in the business of operating a sawmill at Craig, Alaska.

The MacDonald-Weist Logging Company, a corporation, (hereinafter called the Logging Company) all the capital stock of which was owned by four brothers who were its officers and directors, was also a Washington corporation and was engaged in the Territory of Alaska in the business for which it was organized.

On the 2nd day of January, 1918, these companies entered into a contract whereby the Logging Company agreed to cut and raft logs for the Lumber Company at $10.00 per thousand feet. The timber was upon the public domain and the Lumber Company agreed to pay the stumpage, tow the logs to its mill and pay the Logging Company, for its services in cutting and rafting, the stipulated price. Under the contract the Logging Company cut, rafted and delivered 3,779,426 feet of logs, which service, under the contract, was of the value of $37,794.26. On the 20th day of December, 1918, the Lumber Company directed the Logging Company to discontinue cutting under the contract. At that time the Lumber Company had paid to the Logging Company $10,544.57 and there was one raft

of 350,000 feet ready for delivery and 300,000 feet of logs cut and ready for rafting. (Rec. pp. 10-16.)

On March 19th, the Lumber Company was adjudged a bankrupt. The Logging Company, thereafter, duly filed its claim for $27,871.50 due on the contract, (Rec. p. 13) claiming a preference to that amount by virtue of a lien notice duly filed pursuant to law. (Rec. pp. 13-14.)

The Trustee in Bankruptcy objected to the allowance of the claim alleging that the contract was not enforceable in a Bankruptcy Court and also objected to the preference claimed under the lien alleging that the Logging Company, being a corporation and an artificial person, was not within the law granting a lien to persons performing labor upon or who shall assist in obtaining or securing logs. The first objection has been decided in favor of the appellant herein and is the subject of another appeal by the Trustee and will not be further noticed herein.

The Referee in Bankruptcy found for the Trustee upon the question of the validity of the lien and was upheld by the District Court, which ruling and the judgment entered thereon the appellant assigns as error. (Rec. p. 37.)

ARGUMENT.

Section 709, Compiled Laws of Alaska, under which the lien is claimed, reads as follows:

> "Sec. 709. Every person performing labor upon, or who shall assist in obtaining or securing, saw logs, spars, piles, or other timber shall have a lien upon the same for the work or labor done upon or in obtaining or securing the same, whether such work or labor was done at the instance of the owner of the same or his agent. The cook in a logging camp and any and all others who may assist in or about a logging camp shall be regarded as a person who assists in obtaining or securing the saw logs, spars, piles, or other timber mentioned herein."

It is the conclusion of the Referee that it is not reasonable that either a corporation or a contractor can be "designated a laborer" under the meaning of Section 709, C. L. A. He further concludes that "Contractors, even though they labor individually, have no right of lien." (Rec. pp. 20-21.)

The District Court "cannot see anything in the statute which even squints at the idea that contractors who perform no manual labor on or about the logs shall have a lien therefor." (Rec. pp. 32-33.)

Both the District Court and the Referee base their ruling upon the authority of 17 R. C. L. 1118. This text, upon the subject "Scope of Statutes; Laborers and Contrators," is based upon the statement that:

> "It is commonly provided by such statutes that persons laboring in connection with cutting, hauling, or drawing wood, logs or lumber shall have a lien for *personal services, or manual labor*, and it is therefore important in as-

certaining the scope of such a statute to determine what constitutes laboring."

The author then defines a "laborer" as:

> "One who labors, with his physical powers, in the service and under the direction of another, for fixed wages."

We must urge that there is no necessity of bringing appellant within the above definition of a "laborer" since the Alaska statute does not contain the restrictive words *manual labor or personal services* and for the same reason the language from Ruling Case Law does not apply to the present case unless it be the part which reads as follows:

> "In some jurisdictions the statutes have been interpreted so as to permit of the filing of a lien by a contractor for the services rendered by his servants and agents, regardless of whether the lienor has performed any manual labor himself, and in others the privilege of the lien is extended to labor performed by the lienor himself or others working in his employ."

Is a Corporation a "Person" Within the Loggers' Lien Law?

This appeal, as it appears to us, presents two questions of law as follows: 1.—Is a corporation, organized for the purpose of logging, a "Person" within the provisions of Sec. 709 C. L. A.? 2.—Has a contractor a right of lien for the contract price of logs furnished?

Upon the first question we will state that the rule is general that the word "person" in a statute includes a corporation.

> "Since a corporation is for corporate purposes a legal entity and an ideal person in the law, it is regarded as a "person" * * within the meaning of contract and statutory or constitutional provisions, if it is within the reason and purpose of such provisions and is not expressly or impliedly excluded from their operation; and sometimes this rule is expressly declared by statute. This is true of foreign as well as domestic corporations, if the statute may properly apply to them." 14 C. J. 64.
>
> "*Person.* Ordinarily the word *person* includes corporation." 2 Lewis's Sutherland Statutory Construction (2nd Ed.) 770.

The citations of authorities upon the point under *Persons* (subtitle Private Corporations) in Words and Phrases, cover pages.

Particularly as to the laws creating liens of mechanics, and laborers, Corpus Juris continues:

> "So unless expressly or impliedly excluded, a corporation, is a "person", * * etc., within the meaning of statutes relating * * to liens of mechanics, material men, machinists, etc;".

A leading case upon this point is Wetzel & T. Ry. Co. v. Tennis Bros. (C. C. A.) 145 Fed. 458. In that case the Court held that the words "or other person" in a statute giving a lien to "every workman, laborer or other person" included a corporation. The opinion reads, in part:

> "At common law, a corporation is deemed a "person" when the circumstances in which it is placed are identical with those of a natural person, which, irrespective of the statute, and

> the construction placed thereon by the court under the circumstances of this case, would include such a claim as the one sought to be enforced here. It is true that in this case, the claim is in behalf of a corporation; but it is for work of an individual character, as distinguished from corporate service;".
>
> Citing: *Gaskell v. Beard*, 11 N. Y. S. 399.
> *Loudon v. Coleman*, 59 Ga. 653.
> *Doane v. Clinton*, 2 Utah, 417.

The last above cited, and Fagan v. Boyle Ice Machine Co., 65 Tex. 374, are cases from states having statutory provisions that the word "person" includes a corporation.

In Gaskell v. Beard, the New York case cited above, the court said:

> "It will be seen that it (the statute) has not provided, by the most critical implication, that the person or persons to be protected shall be natural persons, but the provision is that any person or persons furnishing the material or performing the labor or service shall be entitled to the lien; and a corporation is a person within the meaning of this language."

In the Compiled Laws of Alaska there is no general provision to the effect that the word "person" includes corporations. It is specifically so provided, however, in the section called the Criminal Code (as adopted from Oregon) and in two special Acts of Congress relative to Transportation and Fisheries in Alaska. Oregon has since (1901) enacted such a general law in addition to the pro-

vision in the Criminal Code as adopted by Alaska. Upon the whole, there is much more reason to conclude that Section 709 should be construed to include corporations than there is to conclude that it should not. Section 706 provides a lien for "any person who is a common carrier * * and any person who shall safely keep or store grain, wares, merchandise and other personal property." There is no more indication in this section that the word "person" is intended to exclude corporations than there is in Section 709, and yet we do not think that the District Court would advance the idea that only a natural person is entitled to the lien provided for the common carrier and warehouseman. At the present time "hand loggers" furnish only a small percentage of the logs delivered to the lumbering mills and since corporations may properly be organized for the purpose of getting out logs, there seems to us to be no reason for denying them the protection of the law.

Has a Contractor a Right of Lien for the Contract Price of Logs Furnished?

This is purely a question of statutory construction. The precise point seems not to have been passed upon by the Courts of Alaska or Oregon. The point is well stated and some very clear illustrations are suggested by Jones on Liens.

> *"Liens for services or manual labor depend on statutes.—*

"Whether this (Loggers') lien be merely for the personal services or manual labor of the claimant, as is the case under the statutes of Maine and Vermont, or includes services performed by his servants and teams, as is the case under the statutes of New Hampshire and of Wisconsin, depends much upon the terms of the statute, though statutes substantially in the same terms have received diverse interpretations in different states. In the latter state the Supreme Court has declared that the words 'labor and services' in a statute giving a lien should be construed as broadly as their common use will allow; and without other restrictive words this language would include labor and services performed by servants and agents, as well as personally, just as, in the common count in assumpsit for work and labor done, recovery may be had for work and labor not personally and manually performed by the plaintiff." (Hogan v. Cushing, 49 Wis., 169, 5 N. W. 490.) Jones on Liens, Sec. 770.

Let us examine the wording of the statutes of Maine and New Hampshire which have been construed respectively to deny and give the contractor a lien for services of servants and agents.

MAINE.—"Whoever labors at cutting, hauling, rafting, or driving logs or lumber * * has a lien on the logs and lumber for the amount due for his *personal services* and for the services performed by his team,"

"Whoever both shores and runs logs by *himself, his servants or agents,* has a lien thereon for the price of such shoring and running;"

It will be seen that the statute specifically provides for personal services in one section and for

services by servants or agents in the other according to the kind of work being done. Could the Maine court, though inclined to construe lien statutes liberally, change the result if a contractor sought to enforce a lien for cutting, hauling or rafting if the service was not performed personally or by team?

And in New Hampshire the statute as plainly provides a lien for services performed by agent or servant.

> NEW HAMPSHIRE. "A person who, *by himself or others*, or by teams, shall perform labor or furnish supplies to the amount of fifteen dollars or more towards rafting, driving, cutting, hauling, sawing, * * shall have a lien thereon."

It is such statutes as Section 709 C. L. A. that the Courts are called upon to construe and then we see what Jones means where he states, in the paragraph quoted above, "the same terms have received diverse interpretations in the different states." His illustrations of this point are the decisions of the courts of Vermont and Wisconsin, the former having denied the lien to contractors while by the latter it is allowed The word "wages" may have been the reason for the ruling in Vermont. The statutes are as follows:

> VERMONT.—"A person cutting or drawing logs, acting under a contract with the owner thereof, shall have a lien thereon for his *wages*."
>
> WISCONSIN.—"Any person who shall do or perform any labor or services in cutting,

hauling, * * * any logs, * * shall have a lien upon such material."

The Trend of the Decisions.

The trend of the decisions in the matter of loggers liens on the point in question is very plainly shown by the authorities of the State of Washington *where the law is almost identical with Section* 709, *C L. A.*

> Sec. 1679, Gen. Stat. Wash.—"Every person performing labor upon, or who shall assist in obtaining or securing, saw logs, spars, piles, or other timber has a lien upon the same for the work or labor done upon or in obtaining or securing the same, whether such work or labor was done at the instance of the owner of the same or his agent. The cook in a logging-camp shall be regarded as a person who assists in obtaining or securing the timber herein mentioned."

The early cases in Washington held that a contractor who did not perform labor personally could not have a lien. The first indication of a more liberal construction is in 1895 when the Court held, against the objection that the claim was partly for labor furnished as distinguished from labor performed:

> "This court has held that one cannot enforce a lien for the labor of hired men, but we think that the testimony in this case shows, in the case of Hopkins, that it was substantially for furnishing and for his own labor, and it is reasonably shown by the proof that the labor performed and the materials furn-

ished were worth the amount claimed." *Hopkins v. Jamieson-Dixon Mill Co.*, 39 Pac. 815.

In 1901, the Washington Court, after commenting on the earlier strict construction in that State, said:

> "In addition to the fact that the court of later years has been inclined to construe the lien laws more liberally in favor of lienors, in this case the lienor, Martin, had a contract for hauling all these shingles, and in no event could the labor employed change the contract price or change the relations between the employer and the lienor, and the case falls within the rule announced by this court in Hopkins v. Jamieson-Dixon Mill Co., where was sustained a lien that was partly for labor furnished as distinguished from labor performed." *Blumauer v. Clock*, 64 Pac. 844.

And in O'Conner v. Burnham, 95 Pac. 1013, (Wash.) *where the agreement was that the respondents should furnish men and teams and place the logs in the river at* $4.00 *per* 1,000 *feet board measure, it was held that claimants had the right of lien.*

While we have found no Oregon case in point, an indication of the liberal construction which might be expected from that State is found in the recent case of Wessenfels v. Schaffer, 195 Pac. 362, where the Oregon Court says:

> "The labor of plaintiff's team in hauling the cordwood was an integral part of the services in obtaining the wood. The statute does not contemplate that logs or cordwood shall be

> secured or handled altogether by hand. * * A reference to the cases arising under the statutes of other states, which differ in language from ours, is of but little avail."

And the Court cites Hogan v. Cushing, 5 *N. W.* 490, *which holds that the words "labor and services" in a statute, without other restrictive words, should be construed to include labor and services performed by servants and agents.*

It seems to us that the statute does not in any way indicate that the "person" to be protected shall be a natural person and, therefore, by settled authority its protection is extended to a corporation; That such intended protection is not defeated by the fact that the claim of lien is based upon the contract price of the services rendered and includes services of claimants servants. As in the Washington case cited above, "in no event could the labor employed change the contract price or change the relations between the employer and the lienor." Any other line of reasoning does not parallel the course of justice and we ask that this Honorable Court reverse the Judgment of the District Court to the end that appellant may be protected.

Respectfully submitted,

RODEN & DAWES,

Attorneys for Appellant.